

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

ANDRE SMITH-LOVEJOY,

Plaintiff,

vs.

THE ELDORADO HOTEL & CASINO,
et. al.,

Defendant.

3:12-cv-00213-ECR (WGC)

**REPORT AND RECOMMENDATION
OF U.S. MAGISTRATE JUDGE**

This Report and Recommendation is made to the Honorable Edward C. Reed, Jr., Senior United States District Judge. Before the court is Plaintiff's pro se Complaint (Doc. # 1-1)¹, and his application for leave to proceed in forma pauperis (Doc. # 1), both filed on April 18, 2012.

A person may be granted permission to proceed in forma pauperis if the person "submits an affidavit that includes a statement of all assets such [person] possesses [and] that the person is unable to pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that the person is entitled to redress." 28 U.S.C. § 1915(a)(1). "[T]he supporting affidavits [must] state the facts as to the affiant's poverty with some particularity, definiteness, and certainty." *United States v. McQuade*, 647 F.2d 938, 940 (9th Cir. 1981) (per curiam) (citing *Jefferson v. United States*, 277 F.2d 723, 725 (9th Cir. 1960)). The litigant need not "be absolutely destitute to enjoy the benefits of the statute." *Adkins v. E.I. du Pont De Nemours & Co.*, 335 U.S. 331, 339 (1948).

¹ Refers to court's docket number.

1 In his application, Plaintiff does not indicate that he is employed, but states that he
 2 receives Social Security in the amount of \$740.00 per month. (Doc. # 1 at 1.) The only
 3 expense he claims to have is \$100.00 per month in child support. (*Id.* at 2.)

4 Based on the information contained in the application, Plaintiff does appear that he is
 5 able to pay the \$350.00 filing fee because his monthly income exceeds his monthly expenses
 6 by \$640.00. Accordingly, Plaintiff's application to proceed in forma pauperis (Doc. # 1)
 7 should be denied.

8 In addition, Plaintiff brings this action pursuant to 42 U.S.C. § 1983. (Doc. # 1-1.) "To
 9 sustain an action under Section 1983, a plaintiff must show (1) that the conduct complained
 10 of was committed by a person acting under color of state law; and (2) that the conduct
 11 deprived the plaintiff of a federal constitutional or statutory right." *Wood v. Ostrader*, 879
 12 F.2d 583, 587 (9th Cir. 1989). Section 1983 does not provide a cause of action for violations
 13 of state law. *See Galen v. County of Los Angeles*, 477 F.3d 652, 662 (9th Cir. 2007).

14 The only defendant Plaintiff names in this action is the Eldorado Hotel & Casino. (*See*
 15 Doc. # 1-1.) A § 1983 lawsuit requires state action. The Eldorado Hotel & Casino is a private
 16 entity. Accordingly, Plaintiff fails to state a § 1983 claim, and his action should be dismissed.²

17 ///

18 ///

19 ///

20 ///

21 ///

22 ///

23 ///

24 ///

25
 26 ² The court notes that Plaintiff has previously has recently had another case dismissed as frivolous. (*See*
 27 3:12-cv-00011-ECR (VPC), Doc. # 11.) The order dismissing that action also mentions that Plaintiff had
 28 previously filed the same action in the Eastern District of California, which was also dismissed. (*Id.*)

RECOMMENDATION

IT IS HEREBY RECOMMENDED THAT Plaintiff's request to proceed in forma pauperis (Doc. # 1) be **DENIED** and that Plaintiff be ordered to **PAY** the \$350 filing fee.

IT IS HEREBY FURTHER RECOMMENDED that Plaintiff's Complaint (Doc. # 1-1) be **DISMISSED WITH PREJUDICE**.

Plaintiff should be aware of the following:

1. He may file, pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of Practice, specific written objections to this Report and Recommendation within fourteen (14) days of receipt. These objections should be titled "Objections to Magistrate Judge's Report and Recommendation" and should be accompanied by points and authorities for consideration by the District Court.

2. That this Report and Recommendation is not an appealable order and that any notice of appeal pursuant to Rule 4(a)(1), Fed. R. App. P., should not be filed until entry of the District Court's judgment.

DATED: April 20, 2012.



WILLIAM G. COBB
UNITED STATES MAGISTRATE JUDGE